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Free to Choose

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REFLECTIONS

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Let me begin by commending the *Seattle University Law Review* for initiating its series of symposia on casebooks. I have long recommended that law reviews expand their use of the symposium format,[1] but the challenge has always been to come up with sufficiently useful topics. A regular series of reviews of casebooks will provide a valuable service to professors in the field, especially novices. I also think the idea of inviting the authors whose books were reviewed to respond in a subsequent issue is a nice touch.

I am, of course, appreciative that the editors decided to review contracts casebooks in their first go-round, and particularly grateful that they chose to include not one but two reviews of my new casebook, *Contracts, Cases and Doctrine*,[2] in the inaugural issue. It was my good fortune that they selected two insightful and generous reviewers in Kellye Testy[3] and Michael Kelly.[4] I learned a good deal from each. They were reviewing a first edition, after all, and their suggestions will most definitely influence the next edition.[5] And the fact that two such critical and creative contract thinkers[6] would praise the book was enormously gratifying.

With all this to be grateful for, I should probably say no more. There is an old trial lawyer's adage which I took pains to follow when I was a prosecutor: "Never argue with the judge when she is ruling in

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1. *See* Randy E. Barnett, *Beyond the Moot Law Review: A Short Story With a Happy Ending*, 70 CHI.-KENT L. REV. 123 (1994).

2. RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE (1995).

3. *See* Kellye Y. Testy, *Intention in Tension*, 20 SEATTLE U. L. REV. 319 (1997).

4. *See* Michael B. Kelly, *Reflections on Barnett's* Contracts, Cases and Doctrine, 20 SEATTLE U. L. REV. 343 (1997).

5. For example, in the next edition I will include a section on conditions. And I will bolster the case selection on foreseeability of loss as Professor Testy suggested. *See* Testy, *supra* note 3, at 327 n.31.

6. *See e.g.*, Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219 (1995); Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755.

your favor."[7] Moreover, responding to any criticism surely runs the risk of appearing defensive if not downright churlish. But what I want to respond to is not really a criticism of the book, nor was it offered as a criticism.

I refer to Professor Testy's characterization of my intentions in writing the book. By her clever choice of title—"Intention in Tension"—she identifies the principal motif of her review, a theme to which she repeatedly returns: Yes, the book is an excellent vehicle for teaching alternative perspectives, but this was unintended on my part, or even contrary to my intentions. But let Professor Testy speak for herself:

> I have found Barnett's casebook an excellent tool in accomplishing both of my pedagogical goals, in particular the goal of critical thinking, although perhaps not in the way Barnett might expect *or like* to hear.
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> . . . .
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> Barnett may well have intended a different purpose for his book than the purpose for which I use it. But that is a risk he accepted when he consented to have Little Brown publish his casebook. Overall, he has created an extraordinarily useful tool for teaching. I hope that in revealing my use of that tool, I have not made him regret his consent.[8]

I write this response simply to assure Professor Testy that to the contrary, far from regretting my consent, I was most pleased by the fact that she has been able to use the book to accomplish her pedagogical purposes—and that she is not alone. Many users of the books take a critical perspective in their classes, and the various materials I included in the book that deal explicitly with issues of race and gender, as well as the selection of several cases, were intended to empower those professors who might want to do so. When I began to hear from these professors after the publication of the casebook, I was heartened to see that my efforts were successful, and Professor Testy's review only further adds to my satisfaction.

My overriding goal in writing the casebook was to provide a set of materials that would engage student interest in contract law and its historical development and would facilitate their learning process, while leaving contracts teachers free to choose whether or not to take a theoretical approach in their classes and, if so, which theory or theories

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7. As would be expected, the old adage actually used the word "he."
8. *Id.* at 323, 341 (emphasis added).

to present or advocate. As Professor Michael Kelly observed in his review:

> The book's clarity permits students to master much of the material before class, allowing the professors to devote their time to honing and elaborating on the basic framework. The directions of elaboration are not dictated by any political slant in the text. Rather, the clean presentation of fundamentals leaves professors free to move classroom discussion in any direction they desire.[9]

That two such different scholars as Kellye Testy and Michael Kelly are both able to use the book effectively in their contracts classes to achieve their respective pedagogical goals is evidence that my subjective intentions were fulfilled.

9. Kelly, *supra* note 4, at 352.